REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

CIVIL SUIT NO. 391 OF 2016

JAMES KENDAGOR SIMATEI.....PLAINTIFF

VERSUS

PHILIP KIPRUTO SIMATEI.....DEFENDANT

JUDGMENT

By a plaint dated 29th December 2016 the plaintiff herein sued the defendants seeking for the following reliefs:

a) A declaration that the plaintiff is the absolute registered and lawful owner of all that parcel of land known as KIPSENENDE/BLOCK 8/ LAMAON/19 and the defendant is and became a trespasser from the year 2003;

b) Mesne profits from the year 2003 when he commenced demanding for vacant possession of the suit land and loss of user from the date the vacant possession ought to have been given to the plaintiff on demand;

c) An order of eviction of the defendant, his agents and/or servants from the suit land;

d) An order of permanent injunction to restrain the defendant, from further intermeddling, interfering and/or in any way dealing with the suit land;

e) Costs of this suit and interests;

f) Any other relief the Honourable Court may deem fit to grant.

Plaintiff's Case

The plaintiff called 3 witnesses in support of his case and stated that he is the owner of the suit land known as KIPSENENDE/BLOCK 8/LAMAON/19. The plaintiff produced a member's Register to prove the same.

1t was the plaintiff's evidence that he bought the said parcel from Lamaon Farm sometime in the year 1985 where his name was duly entered into the register. The plaintiff further produced various payment receipts made through Nyairo and Company made to D.S Bhogal towards the purchase of the said parcel and further receipts of money paid to Lamaon Farm towards the purchase of the parcel and a survey computation.

It was the plaintiff's evidence that he brought up the defendant as his own son and paid school fees for him. He further stated that in 2003, he sold to the defendant a 2 acre portion of the suit land at the cost of Kshs 1,000,000/= out of which he paid Kshs. 120.000/ leaving a balance of Kshs.880, 000/ unpaid to date which gave rise to the current suit. The plaintiff also testified that they entered into an oral agreement whereby they agreed at a consideration of Kshs. 500,000/ per acre and that they did not go to the Land Board for consent to transfer.

The plaintiff also stated that he used to cultivate the suit land before he sold it to the defendant and that his son lives on a portion of the land. He further testified that he has sued the defendant as he refused to pay the balance of the purchase price. He therefore prayed for judgment to be entered against the defendant as prayed in the plaint.

On cross examination, the plaintiff stated that he brought up the defendant like his own son and played the role of a father during his marriage ceremony. He also confirmed that although his share of land parcel L/R 10267 was 28 acres, he has since subdivided the same

into 3 portions and that consent for subdivision was obtained whereby new parcel numbers were given as 129, 130, 131, 132 and 133.On reexamination the plaintiff confirmed that his plot is No. 19 of which he does not have a title to and he does not know whether the subdivisions have been registered. That he spoke to the defendant to pay the balance but he refused.

PW2 testified and stated that the defendant is his cousin whom they grew up together and that the plaintiff who is his father had asked the defendant to stay on the suit land with an option to purchase. That the defendant deposited Kshs. 120,000/ leaving a balance of Kshs 880,000/.

On cross examination he confirmed that the defendant was older than him and that he was not present when the plaintiff entered into the agreement with the defendant. He however confirmed that the defendant is staying on two acres of the suit land.

PW3 a retired field officer Uasin Gishu County from 1982 to 2018 stated that he visited the suit land in 2017 which was approximately 2 acres. It was his evidence that he prepared the crop production report on expected income and that land parcel No. 19 had been cultivated from the year 2003 to 2017. He produced a valuation report as an exhibit before the court.

On cross examination he confirmed that income could not be constant because it would depend on cost of input climate and other variables. He also stated that he was not provided with any ownership documents including title deed, letter of allotment of shares, share certificate or survey map.

DEFENCE CASE

The defendant adopted his statement and stated that in 1995, the Plaintiff who brought him up and whose name he adopted as his surname, asked him to purchase I acre of his land parcel provisional number Kipsinende/Block 8 /Lamaon/19 at the price of Kshs.50,000/=.of which he said that he paid in full. The defendant also testified that in 1999, the Plaintiff again approached him and offered to sell a further I acre of the suit land at the price of Kshs.70,000/= of which he also paid in full making a total of Kehs. 120,000/. It was his evidence that he did not buy the suit land at Kshs. 1million as the plaintiff claimed as at that time parcels of land were not being sold at that price. He produced an agreement dated 2002 whereby a party bought 5 acres at Kshs. 500,000/

The defendant further testified that the land has been subdivided and given to purchasers who bought the parcels. He also stated that the plaintiff has sold the parcel of land and only remaining with ¼ acre. He produced a survey map which indicates that a subdivision was carried out resulting into 5 parcels.

The defendant stated that the original parcel was known as LR No. 10267 measuring 1000 acres or thereabout which was registered in an Asian's name. Further that they entered into an oral agreement and that he has been staying on the suit land which he has developed for more than 21 years. He produced photographs to show the developments on the suit land.

The defendant also stated that his 2 acre land known as provisional plot no. 129 is within land parcel L/R 10267 which is still in the name of the original Indian owners who sold the entire land to the 1st generation buyers. It was the Defendant's evidence that he related well with his adoptive father until the year 2016 or thereabouts when the Plaintiff, acting under the mistaken impression that the Defendant had caused Faulu Micro Finance to attach and sell his cattle upon defaulting on repayment of a loan facility; vowed to take back his land in revenge.

On his counterclaim the defendant stated that the boundaries of the 2 acre portion which he occupies and in use of were marked and the beacons were placed by a surveyor. He stated that the subdivision was carried out with the instructions of the plaintiff and that his 2 acre portion of land is now registered as provisional plot no. Kipsinende/Block 8/Lamaon/129. He stated that his occupation since 1999 has been open and uninterrupted to date. He therefore prayed that the plaintiff's suit be dismissed with costs and his counterclaim be allowed.

In alternative, he asked that the honorable court to find that he has acquired prescriptive rights over the 2 acres under his control by way of adverse possession because he has been in possession and enjoyed open use for over 16 years. He also sought injunctive orders against the plaintiff restraining him from interfering with possession and use of the 2 acre portion of land herein.

On cross examination the defendant admitted that the plaintiff is a member of Lamaon farm and his name appears in the register as No.19 and that he is not a member of Lamaon Farm. He further stated that Plot No. 19 does not exist as there has been a subdivision. He also confirmed that the agreement for the sale of 2 acres was verbal and that they did not have a written agreement with the defendant.

The defendants also stated that he started staying with the plaintiff when he was 6 years old, whereby the plaintiff paid his school fees and he even adopted his name. That he gave him the suit land and showed him where to build. The defendant also denied that the plaintiff had stopped him from developing the suit land.

On reexamination the defendant stated that the plaintiff has no authority to take him to the Land Control Board as he has no title in his name. That they have never had a dispute with the plaintiff until 2016 when the plaintiff filed this suit.

DW2 gave evidence and stated that she is the Defendant's neighbor and that she knew the Plaintiff as well. She stated that the Plaintiff sold 2 acres of his land to the Defendant in the late 1990s. That thereafter, the Defendant took possession, fenced, established his home and has lived thereon since then to date. She stated that as neighbor she has never heard of any dispute over the land herein before this suit was filed.

On cross examination she stated that she was present during the defendant's wedding in 2001 and that currently the plaintiff and the defendant are not in good terms due to the case in court. On reexamination she stated that the defendant has been her neighbor since 1998. The defendant therefore closed his case.

Plaintiff's Submissions

Counsel reiterated the evidence of the parties and listed the following issues for determination by the court:

a) Whether the plaintiff is the owner of the suit land.

b) Whether or not there was a valid land sale agreement between the plaintiff and the defendant.

c) Whether the defendant's claim of adverse possession is sustainable.

d) Whether or not the defendant should pay mesne profits.

e) Whether the plaintiff is entitled to costs.

On the first issue, counsel submitted that it is clear that the plaintiff is the owner of the suit land known as KIPSENENDE/BLOCK 8/LAMAON/19 as the same is not contested and was corroborated by the production of the member's Register. Further that it was the plaintiff's evidence that he bought the said parcel from Lamaon Farm sometime in the year 1985 where the name was duly entered into the register as the legal owner and also that the plaintiff produced payment receipts.

On the 2nd issue Counsel submitted that the plaintiff permitted the defendant to stay on the suit land with an option to purchase the same at a consideration of Kshs. 1,000,000/ - but the defendant failed to honour the agreement. That the defendant in his defence claimed to have bought 2 acres from the plaintiff at a consideration of Kshs. 50,000/ and Kshs 70,000/ respectively but was not supported by any documents. Counsel submitted that under Section 3 of the Law of Contract Act contracts relating to disposition of interest in land must be in writing and signed by all parties to it.

Counsel cited the case of **Patrick Tarzan Matu & Another -vs- Nassim Shariff Abdulla & 2 Others [20091 eKLR where Azangalala, J** (as he then was) struck out the plaintiffs case where he found the contract relied upon was in contravention of Section 3(3) of the Law of Contract Act and declined to entertain the claim for damages for breach of the contract. Inter alia he stated:-

> *"...The applicant in this case has satisfied me that there is no agreement between her and the plaintiffs in terms of the provisions of Section 3(3) of the Law of Contract Act which the plaintiffs can enforce against her. The plaintiffs are urging the view that their claim for damages for breach of the contract of sale is sound. With respect, that view cannot be correct. The claims are made pursuant to an agreement that is contra statute or at the very least does not comply with the law. So, the very foundation of their claim is untenable.*

Counsel further relied on the case of **Silverbird Kenya Limited -vs- Junction Ltd & 3 Others [20131eKLR** where an application had been made by the 1st defendant to strike out the plaintiff's suit on the ground that the lease on which it was anchored had not been signed in contravention of Section 3(3) of the Law of Act. In the suit, stated inter alia:-

> *"...In my view it matters not that the plaintiff had been let into possession of the premises if the contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19th August 2009 in my view does not satisfy the requirements of Section 3(3) of the Law of Contract Act to be the foundation of the plaintiff's claim against the defendants. Section 3(3) of the Law of Contract Act is indeed couched in mandatory terms and does intact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff's suit must fail for being in contravention of Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya. "*
>
> *In the present suit there can be no dispute that the plaintiff's suit is predicated on the alleged oral agreement of sale entered into in 2008 as can be deciphered from the pleadings and material placed before the court by the plaintiff. Without placing reliance on that oral agreement, the plaintiff would be without any cause of action against the defendants. The plaintiff under paragraph 3 of the affidavit in support of the application for injunction depones:*
>
> *That having had oral agreement with the 1st defendant, I was to purchase the parcel for a consideration of kshs.300,OOO/=. I paid the defendant kshs.240,OOO/=, the remainder of kshs.60,OOO/= I was to pay before an advocate at the time we were to sign and execute the transfer documents, which was never to be.*
>
> *The plaintiff thus makes admission that there was no agreement that was in writing yet the foundation of the suit is the said alleged oral agreement. The said agreement having not been in writing contravened Section 3 3 0 the Law o Contract Act and cannot be relied upon to sustain the present suit by the plaintiff. The contract is unenforcible as it related to a disposition of an interest in land and such a contract has to have been in writing and signed by the parties to it and witnessed as required under Section 3(3) of the Law of Contract Act. See the cases of Rainald Schumacher -vs- Aubrey Garth Monsey 120081eKLR, Laikipia Mifuqo Ranching Co. Ltd -vs- Nanyuki Ranching Ltd 120071eKLR and John Michael Waniao -vs- Alubala Abonayo Andambi 12011 leKLR where the courts declined to enforce contracts which fell foul of Section 3 (3) of the Law of Contract Act and proceeded to strike out the suits for noncompliance thereof.*
>
> *In the instant suit, I am satisfied the plaintiff is seeking to effectuate a contract that clearly did not comply with the provisions of Section 3(3) of the Law of Contract Act.*

Counsel therefore submitted that the defendant's claim in the counter-claim must fail on the above reasons of not complying with Section 3 (3) of the Contract Act.

On the 3rd issue, Counsel submitted that the counterclaim is premature as the plaintiff is yet to obtain a title to the suit land and as such a claim for adverse possession cannot issue since it is mandatory that a claim of adverse possession can only be instituted against the registered owner of a parcel of land. Counsel cited the case of **John Mungai Karua v Muguga Farmers Co-Op Society 4 others [2015] eKLR** NAKURU in ELC NO. 205 OF 2012, where the court held that ;

> *There is the alternative prayer for adverse possession. It is not necessary for me to go to the merits or otherwise of this claim. It must fail for the simple reason that the plaintiff never sued the proprietors of the land that he seeks to claim by way of adverse possession. I mentioned earlier that the title holders of the land parcels Nakuru Municipality Block 22/ 51 1, 512, 514,516 517 and 518 are not parties to this suit. There is no way I can entertain the claim for adverse possession, for such claim, must be directed at the registered proprietors of the land parcels in issue*.

Further that the Honourable Court sitting at Malindi in **LAND CASE NO.106 OF 2007 HARO YONDA JUAJE V SADAKA DZENGO MBAURO ANOTHER [2014] EKLR** held that ;

> *"One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land"*

Also in the case of **SOPHIE WANJIKU JOHN V JANE MWIHÅKI KIMANI [20131 EKLR NAIROBI ELC CIVIL SUIT NO. 490 OF 2010,** the court held that;

> *"...l agree with Mr Ojienda's submissions that a claim of adverse possession can only be sustained on a registered owner.……..…..…*

Counsel further submitted that the court observed further that ;

> *In the case of Mbira v Gachuhi 2002 1 EA Page 138 Kuloba J. held that; "Where there were two persons on a piece of land, one of whom was the registered proprietor, and even asserted that the land was theirs and did some act in assertion of that right, then, if the question was which of those two was in actual possession, the person with the title was in actual possession and the other was a trespasser". The defendant built on the land with the permission of her mother in 1986 before it was subdivided. On the land being subdivided her mother sold the land to the plaintiff In my view, the defendant's claim against the plaintiff Sophia Waniiku John on adverse possession in law cannot be sustained. The defendant has failed to prove that she has been on the suit land nec vi, nec clam, nec precario. She was on the said land on the permission of her mother. The defendant's claim of adverse possession has not been proved.*

Mr. Kibii submitted that the plaintiff and the defendant admitted that they are no longer in good terms and as such this negates the claim of uninterrupted possession. Counsel cited the case of **Githu -vs- Ndeete [1984] KLR 776** where it was held among others that:

> *"Time ceases to run under the Limitations of Actions act either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land, giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act. "*

Counsel submitted that the defendant forcefully resides on the disputed land and that is why the plaintiff has come to court to have him evicted.

On the 5th issue as to whether the plaintiff is entitled to mesne profits, Counsel submitted that the plaintiff has lost use and utilization of the suit parcel and that he produced a report to prove the mesne profits. Counsel relied Court of Appeal case of **Attorney General v Halal Meat Products Limited [2016] eKLR** where it considered when mesne profits could be awarded. The court stated as follows: -

> *"It follows therefore that where a person is wrongfully deprived of his property, he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18thEd. Para 34-42. "*

Further that the court in the case of **Rajan Shah T/A Rajan S. Shah Partners v Bipin P. Shah [2016] eKLR** had this to say in considering an issue of whether the Plaintiff had established a case for mesne profits: -

> *"mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant..... "Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.*
>
> *The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant's possession, or right to possession, which has been interfered with.lt is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liablè to pay mesne profits for the use and occupation of the premises till he delivers up possession"*

Counsel also relied on the case of Nyeri **HIGH COURT CIVIL CASE NO.472 OF 1986, SOSPETER MURIMI KARITU V MURIMI KARIO ANOTHER [20091 eKLR** where the plaintiff purchased parcel No. MWERUA /KANYOKORA/131 measuring 7 acres at an agreed purchase price of Kshs.3500/= and started occupying the suit land and planted over 19,000 tea plants which covers over 6 acres within the said piece of land and the Court in upholding the divisional Agricultural extension officer's report observed:

> *Between the three reports I choose to believe that of Government Officials that is to say the reports by Divisional Agricultural Extension Officer' and Divisional Forest Office. They had no reason to exaggerate and or under count the number of the tea bushes As correctly submitted by Mr. Kariithi, the genuine valuation report is the one by the Divisional Agriculture Extension Officer who has the knowledge of value of crops and not persons working in a factory and without knowledge of how tea or any other crop is planted or grown.*
>
> *For purposes of determining this dispute therefore, I would adopt the valuation reports by the Divisional Agricultural Extension Office and Divisional Forest Office. The judgment of this court is therefore that the defendant shall pay the plaintiff:-*
>
> (a) *Kshs.3,500/= being a refund of the purchase price.*
>
> (b) *Kshs.3,680,OOO/= being the total value of tea and arrow roots on the suit premises.*
>
> (c) *Kshs. 1,111,864/80 being the total value of the trees on the suit premises.*
>
> (d) *Costs and interest.*

Counsel also cited the case of High Court sitting at Migori in CIVIL APPEAL NO.83 OF 2015, South Nyanza Sugar Co. Ltd v Dickson Aoro Owuor [2017] eKLR in its finding observed:

> *From the above discourse therefore and in view of paragraphs 12 and 13 of the Plaint it is possible to get the exact amount of special damages in this case which translates to the expected value of the proceeds from the crop plant and the two ratoons. That would make a total sum of Kshs.206,434/50. Out of this amount the balance of Kshs.84,458/95 is to be deducted on account of the expenses incurred by the Appellant. That leaves the balance of Kshs. 121,975/55 which amount is payable to the Respondent."*

Counsel submitted that the defence did not lead any evidence to challenge the evidence of the agricultural extension officer and the same remains unrebutted. He relied on the case of **NAIROBI CIVIL APPEAL NO. 100 OF 2011, DICK OMONDI T/A DITECH ENGINEERING SERVICES -VS- CELL CARE ELECTRONICS (2015) eKLR** iwher it was held ;

> "*The evidence of an expert can only be challenged by evidence of another expert*. *In Miscellaneous Application no. 427 of 2010, Ali Mohamed Sunkar vs- Diamond Trust Bank (K) the court observed and I quote:*
>
> *"The defendant's attempts to resist the plaintiff's application by challenging the handwriting experts report, the report can only be challenged by counter expert report, Elizabeth Hinga who is the head of debit recovery cannot simply discredit the handwriting experts report without tabling another handwriting report. The plaintiff has proved that he did not authorize the bank transfers by his own personal averment and also supported by expert evidence which the defendant has failed to rebut*

On the last issue on who is entitled to costs, Counsel relied on the case of **NAIROBI CIVIL SUIT NO. 193 OF 2010 (NOW ELC.276'A' OF 2017-THIKA)ALTON HOMES LIMITED ANOTHER V DAVIS NATHAN CHELOGOI 2 OTHERS [20181 EKLR** where the court held that;

> *"As provided by Section 27 of the Civil Procedure Act, costs are granted at the discretion of the Court and the said discretion must be exercised judiciously. See Halsbury's Law of England, which provides as follows:-*
>
> *"The court has discretion as to whether costs are payable by one party or another, the amount of Those cost, and when they are to be paid. Where costs are in the discretion of •the court, a party has not right to costs unless and until the court awards them to him and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially. It must not be exercised arbitrarily but in accordance with reason and justice".*

Finally on the issue of costs Counsel relied on the case of R.... Vs...Rosemary Wairimu Munene, Exparte Applicant... Vs...Ihururu Diary Farmers Cooperative Society Ltd, where the Court held that:-

> "*The issue of costs is the discretion of the court as provided by the law.*
>
> *The basic rule on attribution of costs is that costs follow the event It is well recognized that the principle costs follow the event is not to be used to penalize the losing party, rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case".*

Counsel therefore submitted that the plaintiff has proved his case against the defendant on a balance of probability as required hence is entitled to the reliefs sought plus costs.

Defendant's Submissions

Counsel gave a brief background to the case and submitted that the plaintiff has not proved his case against the defendant and as such should be dismissed with costs. Counsel listed the following issues for determination:

a) Whether the plaintiff's claim is statutory time barred.

b) Whether land parcel Kipsinende/ Block 8/ Lamaon/19 exists.

c) Whether the plaintiff is entitled to the prayers sought.

d) Whether the Defendant is in possession on Kipsinende/ Block 8/ Lamaon/129.

e) Whether the Defendants is entitled to prayers sought in the counter-claim.

f) Who will pay costs?

On the first issue as to whether the plaintiff's claim is time barred Counsel submitted the plaintiff 's claim that he had sold to the defendant 2 acres in 2003 but the defendant stated that he had purchased the same between 1995 and 1999 thereby making the cause of action to have arisen more than 17 years ago. That Section 4 of the Limitation of Actions Act provides that a claim arising from breach of contract shall be instituted within 6 years from date of contract. Further that Section 7 of the Limitation of Actions Act provides that a claim for any rights over registered land shall be instituted within a period of 12 years from date of Cause of action. Counsel therefore submitted that the plaintiff's claim is time barred and hence should be dismissed.

Counsel cited the case of **LUCIA NJERI KABERU -VS- JOSPHINE WANJIRU MWANGI & 2 OTHERS, ELC NO. 192 OF 2016 eKLR** where the Plaintiff filed a suit after 12 years from date of cause of action. The Defendant filed a preliminary objection seeking to strike out the on the grounds that the same was time barred and MUNYAO J. held on 5th October 2017 that a claim for land after the lapse of 12 years is statutorily time barred and the suit was struck out with costs.

On the second issue as to whether provisional land parcel Kipsinende/ Block 8/ Lamaon/19 exists, Counsel submitted that it is not in contention that although Title for land parcel L/R 1 0267 is still registered in the name of the said Mr. Pravin Singh Bhagal and another, the registered owners have ceded proprietary interest in the said land to the purchasers under the name Lamaon Farm limited. It is also not in contest that the Plaintiffs share in the said land was equivalent to about 28 acres and that upon subdivision of land parcel L/R 1 0267, the Plaintiff was apportioned provisional land parcel Kipsinende/ Block 8/ Lamaon/19.

That the subdivisions created new numbers which was evidenced by the map produced by the defendant therefore plot No. 19 does not exist.

On the third issue as to whether the plaintiff is entitled to the prayers sought, Counsel submitted that the plaintiff cannot be granted the prayers sought as he is not the registered and absolute owner of any land parcel known as Kipsinende/ Block 8/ Lamaon/19 as alleged in his pleadings. That the Plaintiff has not produced any Title Deed or current search on ownership further that he admitted in his viva voce evidence that the same was a provisional number that had not been registered. Also that the parcel was subdivided it into new numbers 129-134 which resulted after the subdivision. Counsel submitted that the plaintiff's case is an abuse of the court process as Court orders cannot be issued in vain.

On the issue as to whether the plaintiff is entitled to mesne profits, Counsel submitted that the plaintiff admitted that he sold 2 acres to the defendant therefore he cannot be a trespasser. Counsel relied on the case of **MARTHA KARWIRA ANTHONY -VS- BARCLAYS BANK OF KENYA LTD {2019} eKLR** where the Plaintiff filed suit seeking mesne profit and it was held that a claim for mesne profit which is filed after 6 years from date of the cause of action is statutory time barred.

On the counterclaim Counsel reiterated the plaintiff's evidence and submitted that the plaintiff's case should be dismissed with costs and the counterclaim be allowed as prayed and an injunction be issued restraining the plaintiff from interfering with the occupation of the defendant.

Analysis and determination.

This is a case which has very interesting facts where an adoptive father sold land to a son and later wanted him evicted for not completing the payment of the purchase price. The issues for determination are whether there was a valid sale agreement for 2 acres of land by the plaintiff to the defendant. Whether the purchase price was Kshs. 120,000/ or 1000, 000/ as per the assertion of the parties, and whether the defendant has acquired the suit land by way of adverse possession, whether the plaintiff is entitled to the orders sought for eviction and mesne profits and who is to pay costs of the suit.

The plaintiff, the defendant and their witnesses gave evidence and stated that they entered into an oral agreement for sale of 2 acres of land and the defendant took possession of the same.

The question is whether an oral agreement for sale of land is valid. Before the amendment of the law of Contract Act it allowed verbal agreements for disposition of land to be valid.

Section 3(3) of the ***Law of Contract Act*** provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. ***Section 3(7)*** of the ***Law of Contract Act*** excludes the application of ***Section 3(3)*** of the said Act to contracts made before the commencement of the subsection. ***Section 3(3)*** of the ***Law of Contract Act,*** came into effect on 1st June, 2003. Prior to the amendment of ***Section 3(3)*** of the ***Law of Contract Act*** in 2003, the subsection read as follows:

(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(1) Has in part performance of the contract taken possession of the property or any part thereof; or

(11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract. '

It is admitted by both parties that the oral agreement was entered into between 1998 and 1999 which was before the amendment of the Contract Act. It is also on record that the defendant took possession and is living on the suit parcel of land. In oral agreements the party claiming to benefit from the same must satisfy the court that he either took possession of the suit property in part performance of the verbal agreement.

I therefore find that Section ***3 (7)*** of the ***Law of Contract Act*** makes exception to oral contracts for sale of land whereby there is proof of part performance. And that in the current case Section ***3 (3)*** of the ***Law of Contract Act*** was not applicable as it came into effect in 2003 after the plaintiff and the defendant had entered into the agreement. This makes the agreement valid.

The next issue for determination is whether the purchase price was Kshs. 120.000/ or 1 Million as asserted by the plaintiff. The plaintiff admitted that he brought up the defendant as his adoptive son who even adopted his surname as his name. The plaintiff also confirmed that he was paid Kshs. 120,000/ for purchase of 2 acres where the defendant has established his matrimonial home. PW2 the plaintiff's son also gave evidence and confirmed that they grew up together with the defendant and that he is residing on the suit land. He was however not able to state whether the father sold the land to the plaintiff at Kshs. 120,000/ or 1 Million as he was not present when they entered into an agreement.

DW 2 gave evidence and confirmed that the defendant has been residing on the suit land and was not aware that he was not the biological son of the plaintiff. I find that the new purchase price of 1 Million is an afterthought by the plaintiff who wants to get more money from the deal with the defendant. If the defendant had not completed payment of the purchase price, then the plaintiff could have kick started the process of recovery a long time ago and would not have allowed the defendant to continue with the developments on the suit land.

I noticed from the demeanor of PW2 the son of the plaintiff that he was not comfortable giving evidence against a person that he has grown up with as a brother to satisfy the greed of the father. If the plaintiff wanted to be compensated for being an adoptive father then he could have said so and not turning back on an agreement that they had entered into with the defendant. Land prices appreciate very fast in Kenya but from the evidence of the land purchase at the time that the plaintiff and the defendant entered into the oral agreement, it could not have been worth Kshs 1 Million as the plaintiff wants the court to believe.

The terms of the oral agreement were that the plaintiff was selling 2 acres of land to the defendant which both parties confirmed in their testimony. This was to the effect that there was common intention between the two parties in relation to the suit land which the defendant took possession off and developed. This means that the defendant had acquired rights over the suit land under the agreement as the transaction had created a constructive trust in favor of the defendant herein when he paid the full amount of the purchase price as per their agreement which trust is enforceable.

Further the doctrine of proprietary estoppel applies to the current case as the plaintiff cannot be allowed to keep the money and the land having entered into an agreement and allowed the defendant to take possession of the suit land. See the case of **William Kiptarbei Korir & 6 Others —VSDanson Muniu Njeru (2018) eKLR** where the judges held that:-

"This is a case where the deceased by a written agreement sold the entire land to three joint purchasers including the 1st and 2nd appellants, received the purchase price, gave each vacant possession and left the land, the deceased in addition obtained the consent to sub-divide the land pursuant to the agreement but died before he transferred the land.

The 1st and 2nd appellants settled their families on respective portions and each developed the land by building dwelling houses. By the time the respondent filed a suit for eviction, each of the 1st and 2nd appellants had been in possession of the land for over ten years.It is clear that the deceased and the 1st and 2nd appellants had common intention that each purchaser would get the interest purchased. The doctrine of constructive trust applies in those circumstances. Moreover, the deceased by a written agreement made representation to each of the 1st and 2nd appellants that they would get an interest in land and each acted to his own detriment by settling the family on the land and developing the land. Similarly, the doctrine of proprietary estoppel applies in those circumstances."

Further in Halsbury's laws of England Vol. 16 (2) 4th Ed. Re-issue state at para 1089: states that:

"Unlike other kinds of estoppel, proprietary estoppel may be a cause of action but only where it involves the promise of an interest in land. "

Section 28 (b) of the Land Registration Act, provides for trusts as overriding interests to which registered land is subject. See the case of **Mwangi & another —vs — Mwangi (1986) KLR 328**, where it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in

the title documents does not affect the enforceability. Further as was stated by Lord Reid in **Steadman — vs- Steadman (1976) AC 536, 540,**

> *"If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable".*

I find that the defendant bought 2 acres of land from the plaintiff and paid the full purchase price. This is a case where the relationship between the plaintiff and the defendant has gone sour as was stated in evidence and therefore the plaintiff wants to get back at the defendant.

Finally in the most recent case of **Willy Kimutai Kitilit v Michael Kibet [2018) eKLR** applied the doctrine of constructive trust by stating that *"By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case."*

On the issue as to whether the defendant acquired the suit land vide adverse possession, having found that the defendant acquired rights vide constructive trust as he had paid the full purchase price, I will not go into the issue of adverse possession as it is not forceable in this case.

I have considered the pleadings the evidence on record and the submission of both Counsel and find that the plaintiff has failed to prove his case against the defendant and is therefore dismissed with no orders as to costs. I find that the defendant is entitled to the two acres that he purchased from the plaintiff. The plaintiff to ensure that the transfer of two acres is effected to the defendant. Each party to bear their own costs.

DATED and **DELIVERED** at **ELDORET** this **8th DAY** OF **October, 2019.**

M. A. ODENY

JUDGE

JUDGMENT READ in open court in the presence of Mr.Kibii for the Plaintiff and Mr.Kipnyekwei for Defendant